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1961

# John Hardley v. Max Swapp et al : Brief of Defendants and Respondents

Utah Supreme Court

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Gustin, Richards & Mattsson; Olsen & Chamberlain; Pickett & Pickett;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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JOHN YARDLEY,  
*Plaintiff and Appellant,*  
—vs.—

MAX SWAPP, Executor of the Estate  
of Melvin Swapp, deceased; DUNCAN  
FINDLAY; JAMES C. LITTLE and  
SARAH D. LITTLE, his wife; MARY  
M. LITTLE; KAY LITTLE; a single  
man; VAL LITTLE and VIVIAN H.  
LITTLE, his wife, EMMA LITTLE;  
NIELS LITTLE, a single man, and  
FAY ALVEY,

*Defendants and Respondents.*

FILED  
MAY 19 1961

Supreme Court, Utah

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BRIEF OF DEFENDANTS AND RESPONDENTS

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GUSTIN, RICHARDS & MATTSSON  
151 North Main Richfield, Utah  
Attorneys for Mary M. Little; Kay  
Little, a single man; and Val Little  
and Vivian H. Little, his wife

OLSEN & CHAMBERLAIN  
76 South Main Richfield, Utah  
Attorneys for Duncan Findlay

PICKETT & PICKETT  
Pickett Building St. George, Utah  
Attorneys for Max Swapp, Executor of  
the Estate of Melvin Swapp, deceased

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# IN THE SUPREME COURT of the STATE OF UTAH

JOHN YARDLEY,  
*Plaintiff and Appellant,*  
—vs.—

MAX SWAPP, Executor of the Estate  
of Melvin Swapp, deceased; DUNCAN  
FINDLAY; JAMES C. LITTLE and  
SARAH D. LITTLE, his wife; MARY  
M. LITTLE; KAY LITTLE; a single  
man; VAL LITTLE and VIVIAN H.  
LITTLE, his wife, EMMA LITTLE;  
NIELS LITTLE, a single man, and  
FAY ALVEY,  
*Defendants and Respondents.*

Case  
No. 9379

## BRIEF OF DEFENDANTS AND RESPONDENTS

### STATEMENT OF FACTS

For all purposes in the instant Brief, the parties will be referred to and page references to the transcript of the trial will be made in the same manner and by the same designations as those adopted and used in the Brief of Plaintiff and Appellant. However, it should be noted that Respondents herein include Max Swapp, Executor of the Estate of Melvin Swapp, deceased; Duncan Findlay; Mary M. Little; Kay Little, a single man; and Val Little and Vivian H. Little, his wife. The remaining

Defendants (James C. Little and Sarah D. Little, his wife; Emma Little; Niels Little, a single man; and Fay Alvey) claim no interest in the water rights and properties involved and so stated in their Answer to Plaintiff's Complaint.

Respondents disagree with certain statements made by Appellant in the Statement of Facts contained in his Brief and also call attention as follows to various facts not recited in Appellant's Brief:

1. Littles' land is traversed by both Castle Creek and Minnie or Little Creek. While it is correct that part of it can be watered only from Castle Creek and another part only from the commingled waters of both Creeks, it is also true that another part of Littles' land is east of Minnie or Little Creek and can be watered only from Minnie Creek (T. 183, 185, 196, 267-269).

2. At page 3 of Plaintiff's Brief, he refers to a single diversion used by him, whereas the transcript shows he has five diversions, at least four of which were installed and constructed by him during or after the year 1929 (T. 69-72, 113-115).

3. Plaintiff's lands are traversed only by Minnie or Little Creek and can be watered only by means of diversions from said Creek. They are located a substantial distance from and below the confluence of Minnie or Little and Castle Creeks (T. 126-127).

4. Over Respondents' objections and without proper foundation, the "Morse Decree" and the "Cox Decree" were admitted in evidence (T. 298-300).

Plaintiff failed to establish that the parties to whom were purportedly awarded the waters of "Castle or Minnie Creek" in the "Morse Decree" and those purportedly awarded by the "Cox Decree" the waters of "Castle and Minnie or Little Creeks, and out of spring areas tributary to said creeks during the entire year" were actually parties to the actions in which said Decrees were made.

5. Respondents deny that with the help of the State Engineer or otherwise any program was worked out whereby the parties took the water on turns. The transcript shows that the Sevier River Commissioner merely made inspections and examinations, but did not divide or purport to divide the water or to fix turns or to work out any program of taking water on turns (T. 272-273). Respondents deny that any turn system was ever worked out by any means (T. 273).

6. Whatever rights the parties have in and to the waters of each and both of said Creeks are diligence rights, based on physical appropriation and use prior to May 12, 1903, when Chapter 100 of the *Laws of Utah*, 1903, became effective, and no rights have been acquired by appropriation since then through the State Engineer's Office (T. 8-9). At no time or place did Plaintiff establish any use of any water on his lands prior to 1904, 1905, or 1906. Any irrigation use made on his lands prior to 1927 was shown to be by means of one diversion for one year only (in 1904, 1905, or 1906) from Minnie Creek for something between 5 acres and 30 acres of oats (T. 34, 36, 63-64).



7. As a downstream user, Plaintiff has added several diversions, at least four, since 1919 when he took over the property he now operates, (T. 113-115) and has put under irrigation substantial acreages, but when he came on to the property it was almost entirely a sheep-bed and “had been tramped to death by sheep” and no irrigation or farming was being conducted. (T. 118-119).

8. The “Cox Decree” admitted in evidence provides on page 230 thereof as follows :

“IT IS FURTHER ORDERED, ADJUDGED and DECREED that, except as herein otherwise specifically provided, all water shall be measured to the owners and users thereof as of their respective dates of priority, so that each user or owner of the waters herein decreed shall be assured that his right will be satisfied in full before any subsequent appropriators shall receive any water whatever; . . . .”

Plaintiff not only failed to establish any use prior to 1904 and established only a limited one-season use between then and 1927 (T. 22-23, 63-64) but he failed to establish any priorities of any kind as between himself and the Respondents or any of them or in connection with the rights of any parties to the instant action.

Respondents disagree with Appellant’s contention that the evidence is now to be reviewed in the light most favorable to him. On the contrary, such evidence is now to be reviewed in the light most favorable to Respondents, they having prevailed in the trial court. The case of *Martin v. Stevens*, 121 Utah 485, 243 P. 2nd 747, cited by



Respondent in his Brief, is not applicable to our situation, that having been a jury case.

Throughout the instant Brief, certain matters have been italicized by us for purposes of emphasis.

## STATEMENT OF POINTS

### POINT NO. I

THE COURT DID NOT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS AT THE CONCLUSION OF PLAINTIFF'S CASE FOR THE REASONS CITED BY APPELLANT AND PLAINTIFF IN HIS BRIEF OR FOR ANY OTHER REASONS WHATSOEVER:

- (A) THE PROVISIONS OF THE "COX DECREE" PURPORTING TO AWARD ALL OF THE FLOW OF MINNIE AND CASTLE CREEKS TO PLAINTIFF AND THREE OTHER PERSONS DID NOT ESTABLISH A PRIMA FACIE RIGHT IN PLAINTIFF TO AT LEAST ONE-FOURTH OR ANY OTHER PARTICULAR FRACTIONAL PART OF THE TOTAL FLOW OF SAID STREAMS.
- (B) THE PROVISIONS OF THE "COX DECREE" REFERRED TO IN (A) ABOVE DID NOT REQUIRE THE COURT TO PROCEED TO DEFINE AND CLARIFY PLAINTIFF'S CLAIMED RIGHT IF THE SAME BE MORE OR LESS THAN ONE-FOURTH OF THE TOTAL FLOW OF THE STREAMS INVOLVED, AND DID NOT RELIEVE PLAINTIFF FROM ESTABLISHING THE PRIORITY, NATURE, EXTENT, AND MEASURE OF HIS CLAIMED RIGHT AND THE COMPARATIVE AND RESPECTIVE PRIORITIES OF THE CLAIMED RIGHTS OF PLAINTIFF AND RESPONDENTS.
- (C) RESPONDENTS AGREE THAT NO ENLARGEMENT OF DEFENDANTS' RIGHTS CAN BE RECOGNIZED AFTER THE ENTRY OF THE "COX DECREE" IN NOVEMBER, 1936, NOR, FOR THAT MATTER, AFTER MAY 12, 1903, BUT CONTEND THAT SUCH FACT OR RULE HAS NO BEARING ON ANY MATTERS BEFORE THE

COURT AND DID NOT RELIEVE PLAINTIFF FROM ESTABLISHING BY EVIDENCE THE ESSENTIAL ELEMENTS OF HIS OWN CASE, WHICH HE FAILED TO DO.

## ARGUMENT

### POINT NO. I

THE COURT DID NOT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS AT THE CONCLUSION OF PLAINTIFF'S CASE FOR THE REASONS CITED BY APPELLANT AND PLAINTIFF IN HIS BRIEF OR FOR ANY OTHER REASONS WHATSOEVER:

- (A) THE PROVISIONS OF THE "COX DECREE" PURPORTING TO AWARD ALL OF THE FLOW OF MINNIE AND CASTLE CREEKS TO PLAINTIFF AND THREE OTHER PERSONS DID NOT ESTABLISH A PRIMA FACIE RIGHT IN PLAINTIFF TO AT LEAST ONE-FOURTH OR ANY OTHER PARTICULAR FRACTIONAL PART OF THE TOTAL FLOW OF SAID STREAMS.

By Appellant's Point No. 1 (A), he urges that the Court erred in granting Defendants' Motion to Dismiss because the provisions of the "Cox Decree" giving all of the flow of Minnie and Castle Creeks to Plaintiff and three other persons established a prima facie right in Plaintiff to at least one-fourth of the total flow of said streams. Plaintiff concludes that the wording of said Decree, at page 18 thereof, makes each of the four persons named, to-wit, Blanche Showalter, M. C. Swapp, James A. Little and John Yardley, the owners of an undivided one-fourth interest in the said Creeks and is analogous of a situation where property is granted or conveyed to two or more individuals. In support of said conclusion and contention, Plaintiff cites Section 78-1-5, *Revised Statutes of Utah*, 1933, which was in effect when the "Cox Decree" was entered and which states that a

grant of real estate to two or more persons in their own right shall be a tenancy in common unless expressly declared otherwise. Several case and text book citations are given to the effect that a presumption exists that realty conveyed to two or more persons is owned by them in co-tenancy and as equal undivided owners.

It is significant to note, however, that all of the authorities cited by Plaintiff are confined to "grants", "transfers", "deeds", and "conveyances." Chapter 1 of Title 78 of the *Revised Statutes of Utah*, 1933, deals with conveyances of real estate. Section 78-1-1, *Revised Statutes of Utah*, 1933, which is now Section 57-1-1, *Utah Code Annotated*, 1953, reads:

"57-1-1. Conveyance defined. — The term "conveyance" as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except Wills, and leases for a term not exceeding one year."

Consequently, when Section 78-1-5, *Revised Statutes of Utah*, 1933, stated that a Grant of an interest to two or more persons created a tenancy in common it referred to a "grant" or "conveyance" of real estate by an instrument in which real estate or an interest therein was created, aliened, mortgaged, encumbered or assigned. Certainly, it cannot be contended that water rights or interests in water rights, even if considered to be real estate, can be "created, aliened, mortgaged, encumbered or assigned" by a Decree of the Court. A Decree ad-

judicating water rights merely determines existing ownerships and does not create, alien, mortgage, encumber, assign, convey, grant or transfer water rights or anything else.

The Respondent fails to cite a single case holding that a Decree adjudicating and determining that several persons are the owners of certain water rights makes them tenants in common, and more particularly, makes them equal owners.

The "Cox Decree" itself provides the answer when it says on page 230 thereof that unless otherwise specifically provided, all waters referred to in the Decree "shall be measured to the owners and users thereof as of their respective dates of priority, so that each user or owner of the waters herein decreed shall be assured that his right will be satisfied in full before any subsequent appropriators shall receive any water whatever."

*Bacon vs. Plain City Irrigation Co.*, 87 Utah 564, 52 P. 2nd, 427 (1935) holds that the relative date of priority of a water right is as much a part of an established water right as is the number of second feet covered by it. Certainly, if Plaintiff had any water right at all, then his relative date of priority was part of his case and it was up to him to establish that, which he failed to do.

The case of *Deseret vs. Hooppiana*, 66 Utah 25, 239 P. 479, set forth clearly the rule of principle of law that he who is first in time was first in right. Consequently, it was the Plaintiff's duty to establish who was first in

time and thereby became first in right, for how much water, the respective priorities, acreages and uses.

- (B) THE PROVISIONS OF THE "COX DECREE" REFERRED TO IN (A) ABOVE DID NOT REQUIRE THE COURT TO PROCEED TO DEFINE AND CLARIFY PLAINTIFF'S CLAIMED RIGHT IF THE SAME BE MORE OR LESS THAN ONE-FOURTH OF THE TOTAL FLOW OF THE STREAMS INVOLVED, AND DID NOT RELIEVE PLAINTIFF FROM ESTABLISHING THE PRIORITY, NATURE, EXTENT, AND MEASURE OF HIS CLAIMED RIGHT AND THE COMPARATIVE AND RESPECTIVE PRIORITIES OF THE CLAIMED RIGHTS OF PLAINTIFF AND RESPONDENTS.

Plaintiff next contends that the provisions of the "Cox Decree" specifying a water right to Plaintiff in Minnie and Castle Creeks required the court to proceed to define and clarify that right if the same be more or less than one-fourth of the total flow of the streams. Here again, Plaintiff's argument is fatally defective in that he failed to show any water right in either Minnie or Castle Creeks because he admitted that if he had anything at all, it was a diligence right. Despite this, he showed no use prior to 1904, 1905 or 1906 and therefore failed to show any rights whatever. Furthermore, the court is not "required" to proceed and define anything in such a case as this. It is up to the Plaintiff to introduce evidence which establishes a right in himself, the priority, nature, quantity and extent thereof, the rights and priorities of those he is suing, and that they have deprived him of water to which he is entitled. The court cannot "proceed to define and clarify" anything in the absence of proof which establishes a prima facie case and establishes

that Plaintiff has some right to the relief he is seeking. That is the exact reason for Rule 41 (b) of the Utah Rules of Civil Procedure, which provides as follows:

“ . . . After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief . . . ”

Furthermore, the Plaintiff did not establish that anything the Defendants have done or have not done has resulted in less water being available to Plaintiff than would have been obtainable by him otherwise.

Plaintiff insists that there is need for the Supreme Court of Utah to determine for the benefit of the District Court whether the time to be used in determining and fixing the rights of the parties would be the use made of the waters in 1936 when the “Cox Decree” was entered or 1906 when the “Morse Decree” was entered. He conveniently ignores the crucial point which is 1903 and prior thereto when the measure and extent of diligence rights were determined and after which no one could increase his water rights by physical appropriation and use.

See *Chapter 100, Laws of Utah, 1903*; and *Jensen v. Birch Creek Ranch*, 76 Utah 356, 289 P. 1097 (1930), which holds relative to the application of Chapter 100 of *Laws of Utah, 1903*, that after May 12, 1903, the effective date of said Chapter, appropriation could only be accomplished by application through the State Engineer's



Office, but prior thereto a prior appropriator could acquire water by use, but could not increase his demand after that date and his use of the water so as to deprive a junior appropriator of any right which he may have acquired before the increase of use by the prior appropriator.

Plaintiff cites the prayer of his complaint and states that it asks judgment for the court to clarify and specify with specific verbiage the provisions of the Cox Decree mentioned in this complaint. However, certainly Plaintiff is not contending that the prayer of his Complaint will supply fatal defects and omissions in proof. It is up to the Plaintiff to supply evidence which would entitle him to have any such judgment. This he failed to do. Plaintiff would have the Defendants saddled with the burden of going forward, having once introduced the "Cox Decree," and of proving Plaintiff's case. This the Defendants are not required to do. For the purposes of this litigation, Defendants need not state that they were or were not parties to the "Cox Decree" action. That was part of Plaintiff's burden to establish. Even if they were parties, there were no presumptions. Where the water was purportedly awarded to four persons, it was then up to one bringing a matter into court to establish his priority date and the respective priority dates of those he was suing. In our case the priority date established by Plaintiff proved by his own evidence that he did not even own a right in either Creek, that he could not irrigate from one Creek at all, and that the first use out of Minnie or Little Creek, made by anyone whom-



soever on Plaintiff's presently owned lands was after 1903, which would mean that Plaintiff has no right. By his own testimony and the evidence he introduced he failed to establish in himself either a diligence right acquired before May 12, 1903, or an appropriated right acquired by application after that date.

- (C) RESPONDENTS AGREE THAT NO ENLARGEMENT OF DEFENDANTS' RIGHTS CAN BE RECOGNIZED AFTER THE ENTRY OF THE "COX DECREE" IN NOVEMBER, 1936, NOR, FOR THAT MATTER, AFTER MAY 12, 1903, BUT CONTEND THAT SUCH FACT OR RULE HAS NO BEARING ON ANY MATTERS BEFORE THE COURT AND DID NOT RELIEVE PLAINTIFF FROM ESTABLISHING BY EVIDENCE THE ESSENTIAL ELEMENTS OF HIS OWN CASE, WHICH HE FAILED TO DO.

Plaintiff next contends that no enlargement of Defendants' rights can be recognized after the entry of the "Cox Decree" in November, 1936. This may be admitted, but we fail to see where it has any bearing on Plaintiff's failure to establish a *prima facie* case or to establish facts showing that he was entitled to any relief or judgment whatsoever.

The fact that John Yardley testified that he irrigated 125 acres in 1936 and 140 acres from 1936 through 1949 is meaningless. If sufficient water came down to him, he had a right to use the same, unless, possibly, downstream users made a complaint about his having added at least four new ditches and diversions and very substantial acreages under irrigation to which he was not entitled. Those years were admittedly wet years, when everyone had all the water he wanted. That does not

establish that Plaintiff had any rights in the Creeks or the quantity, priority and extent of any rights he might claim, nor does it establish that during the last ten or eleven drought years, any actions on the part of the Defendants have deprived Plaintiff of water to which he was entitled, if any.

Defendants agree that without a proper filing and approval, there could be no extension of water rights since 1936 or for that matter since 1903, except that prior to 1939 upstream parties could acquire from others by adverse possession and use already-appropriated rights. However, we are confronted with diligence rights, and Plaintiff, as a downstream users, must rely on 1903 and prior thereto to establish the measure, extent, acreage, point of diversion, use and quantity of water to which he is entitled, in all of which respects he failed. Furthermore, as admitted by his brief, he could not expand his rights by adverse possession after 1939. Furthermore, as a downstream user, *he could not at any time "adverse" anyone above him*, namely, Respondents herein.

Is Plaintiff now contending that by virtue of use made from 1927 to 1939, he has acquired a title to some water rights by adverse use and possession? If that is his contention, the answer is that he cannot succeed because he was at all times a downstream user.

In *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. 2d 634 (1943) it is stated that the general rule is that adverse use will not "run up stream" and that in a situation in which the

use of the water is made by one whose point of diversion is located below the headgate of another, such use will seldom be adverse to the upstream claimant. This same case held that title to water could be acquired by adverse use between 1903 and 1939, given all the required elements, namely, seven years of continuous, uninterrupted, hostile, notorious, and adverse use, under claim of title exclusive of any other right, but in *Smith v. Sanders*, 112 Utah 517, 189 P. 2d 701 (1948) the Court indicated that Section 100-3-1, *Utah Code Annotated, 1943*, enacted in 1939, prohibited anyone from acquiring a right to the use of water by adverse possession after the enactment of that Statute.

The case of *Francis v. Roberts*, 73 Utah 98, 272 P. 633 (1928) involved a situation where Defendant's lands were mainly meadow and pasture and were higher in elevation than Plaintiff's lands, so that the waste or surplus water from the irrigation of the Defendant's lands naturally flowed down to Plaintiff's lands. The Court held that Plaintiff had failed to show that his use of the water was adverse and hostile to the use by the Defendants, since no hostility to or denial of the right of the owners of the upper lands to use the water whenever they desired had been established.

On the question of adverse possession, if Plaintiff is relying thereon in view of his failure to establish any right by appropriation, either before, during or after 1903, by the legal means applicable at any particular time, it is fundamental that the presumptions are against the

acquisition of title by adverse use, and that to constitute such use the possession must be actual, continuous, hostile to the real owner, and manifest from the nature of the circumstances so that the owner may be informed of it. No such showing has been or can be made in the case before the Court. See *Center Creek Water and Irrigation Co. vs. James Lindsay*, 21 Utah 192, 60 P. 559, and *Clark vs. North Cottonwood Irrigation & Water Co.*, 79 Utah 425, 11 P. 2d 300.

### SUMMARY

It is a matter of established law in the State of Utah that the prior appropriator of waters for beneficial use has a better right to waters than any subsequent appropriator. *Brady v. McGonagle, State Engineer*, 57 Utah 424, 195 P. 188. Consequently, it must follow that when a Plaintiff alleges that someone else has deprived him of water, the said Plaintiff must establish both his right and his priority, neither of which was done in the instant case. There was a complete failure of proof. The situation is similar to that which confronted the Court in *Lost Creek Irrigation Company vs. Rex, Jennings, and Jennings*, 26 Utah 485, 73 P. 660 (1903) which was an action to quiet title to water rights. The Utah Supreme Court held that the lower court was in error in awarding each party half of the waters in the creek in question after June 15 of each year and the Defendant the high and surplus waters prior to that date, because such court could not determine from the evidence what each party was entitled to. There was no evidence showing the amount of water necessary for the use of the parties, but

nevertheless the trial court made a finding that Plaintiff and Defendant each had diverted and used one-half of the normal flow. On appeal, the Utah Supreme Court held that this was not sustained by the evidence and that the Plaintiff, having failed to prove by evidence his title to any definite amount of water, should have been nonsuited.

The action of the lower Court in the instant case in dismissing Plaintiff's Complaint at the conclusion of his case on the ground that upon the facts and the law Plaintiff had shown no right to relief was correct and should be sustained and affirmed.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON  
Attorneys for the Defendants Little,  
151 N. Main, Richfield, Utah;

OLSEN & CHAMBERLAIN  
Attorneys for the Defendant  
Duncan Findlay  
76 So. Main, Richfield, Utah;

and

PICKETT & PICKETT  
Attorneys for the Defendant, Max  
Swapp, as Administrator of the Estate  
of M. W. Swapp, deceased, Pickett Bldg.,  
St. George, Utah

By Carvel Mattsson